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# Strengthening international law's capacity to govern through multilayered strategic partnerships

*Charlotte Ku\**

## **Introduction: The expansion in scope and actors of international law**

One of the dramatic developments in international law over the last 150 years has been its expansion into areas that have reached more and more deeply into the state's domain to affect individuals and private entities. This trend has caused writers like Louis Henkin to conclude that a shift took place in international law in the twentieth century from espousing state values to espousing human values.<sup>1</sup> An empirical basis for confirming this trend can be found in reviewing the subject matter of multilateral treaties over time. Drawing on the data collected through the Comprehensive Statistical Database of Multilateral Treaties (CDSMT), we can see that of the more than 5 000 multilateral treaties that existed between 1648 and 1999, more than ninety per cent were concluded in the twentieth century and of those, the most significant growth in treaty-making has been in the areas of economics, human welfare, and the environment – essentially new areas of focus for international regulation and concern.<sup>2</sup>

The actors or subjects in international law have also expanded in both numbers and types, with the number of states tripling in the course of the twentieth century and private entities like corporations and non-governmental organisations gaining prominence as recognised international actors. This new standing is related to the development of international regulation in issues of economic and human welfare where private entities are key to effective governance. This has created strategic partnerships between public and private entities and authorities. An additional level of activity is also emerging in the transnational realm, within the public sphere, and at the sub-national level where local officials are becoming important players in the

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<sup>1</sup>Henkin 'Notes from the President' (1994) Jan/Feb *ASIL Newsletter* 1-2.

<sup>2</sup>Comprehensive statistical database of multilateral treaties (CDSMT), a project of the Honours Programmes at Pennsylvania State University directed by Professor John Gamble.

regulation of such global concerns as public health and environmental protection. The need to understand and to acknowledge where and how the public and private spheres come together have led both to important scholarship, and to institutional developments. As an academic subject, much pioneering work to draw attention to this phenomenon of shifting boundaries can be linked to feminist scholarship that sought to raise awareness of the experience of women whose lack of public status and identity often precluded pursuit of their individual rights, and the political engagement to correct that situation.<sup>3</sup>

Another area that encouraged debate about the relationship between the public and the private, is in the area of international economic and trade law.<sup>4</sup> Investment and trade agreements were made by states, but the disputes often occurred between private corporations and the public authorities in the countries where trade or investment was taking place. This meant that in dispute settlement this public/private relationship had to be ordered. Such innovations as the International Centre for the Settlement of Investment Disputes were created so that private parties could directly pursue a dispute with a state to resolve issues arising from investments, but without submitting themselves to the national jurisdiction of the state involved. Social movement literature has also been helpful in highlighting the individual dimension to studies of states and other forms of transnational activity.<sup>5</sup>

### **Acting in a new transnational political space**

Strategic partnerships between international, national, and sub-national entities, as well as between public and private entities, have therefore emerged to create a new transnational political space for several reasons:

- the limited capacities and resources of international institutions;
- the changing character of issues of public concern;
- the more developed institutional, political and legal processes that are available at the national level; and
- the opportunity for cooperation and coordination in a less institutionalised or formalised framework that may avoid political controversy.<sup>6</sup>

The international relations scholars, Robert Keohane and Joseph Nye, have observed that in addition to the formal governance provided by states and the intergovernmental organisations that states have created, governance also takes place through networks of agents that can be both public and private, and that

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<sup>3</sup>See Charlesworth and Chinkin *The boundaries of international law: A feminist analysis* (2000).

<sup>4</sup>See, eg, Brand 'Sovereignty: The state, the individual, and the international legal system in the twenty first century' (2002) 25/Summer *Hastings International and Comparative Law Review*.

<sup>5</sup>See Kagram, Riker and Sikkink 'From Santiago to Seattle: Transnational advocacy groups restructuring world politics' in Khagram (ed) *Restructuring world politics: Transnational social movements, networks, and norms* (2002) 3-23.

<sup>6</sup>Slaughter 'Courting the world' (2004) March/April *Foreign Policy* 79.

derive credibility from their flexibility and dynamism to address new issues with the lowest start-up costs.<sup>7</sup> Since changes in the international system require specific action, agents in a position to initiate such action and change can wield power and influence out of proportion to their apparent resources.

An example of the operation of this transnational political space is the appearance of practices that are described as 'soft law'. Of course, the term 'soft law' itself seems contradictory and is the subject of controversy. Yet, we see it appearing on the legal terrain because international affairs have outpaced the ability of the traditional law-making machinery to address cross-border needs 'through international organizations, specialized agencies, programmes, and private bodies that do not fit the paradigm of Article 38(1) of the Statute of the ICJ'.<sup>8</sup>

We can see where soft law has proved useful in performing specific functions:

- To move domestic issues into the international realm – for example as seen in commodity agreements or marketing specific products like breast milk substitutes.<sup>9</sup>
- To link international law to private entities such as individuals and transnational corporations regulated principally by domestic law.<sup>10</sup>
- To overcome the political difficulty of undertaking a formal legal obligation. Examples of such important 'political' agreements are the Yalta Agreement of 1945 and the Helsinki Final Act of 1975.
- To supplement hard law that may set out a framework for consultation and cooperation, by soft law. Dinah Shelton explained that:

Typically, the framework convention establishes a structure for further co-operation between the parties through monitoring and implementation procedures, exchanging data, and facilitating regulation. They also permit ease of response to changed scientific knowledge and circumstances.<sup>11</sup>

A further interesting phenomenon that emerges from the framework approach, is that the local and the international entity might work together and bypass the national law all together. An example of this is in the area of climate change where municipalities have come together to implement standards regardless of whether a state is party to the relevant climate change conventions.<sup>12</sup> There

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<sup>7</sup>Keohane and Nye 'Introduction' in Nye and Donohue (eds) *Governance in a globalizing world* (2000) 18-20.

<sup>8</sup>Chinkin 'Normative development in the international legal system' in Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2000) 42.

<sup>9</sup>Chinkin 'The challenge of soft law: Development and change in International Law' (1989) 38/Oct *ICLQ* 853.

<sup>10</sup>*Id* at 854.

<sup>11</sup>Chinkin n 8 above at 27.

<sup>12</sup>Betsill and Bulkeley 'Cities and the multilevel governance of global climate change' (2006) 12 April/June *Global Governance* 141-59.

are even examples of provisions of conventions like CEDAW that are being enacted in municipal legislation although the state is not party to the treaty.

### **International law's capacity to govern in a globalised transnational space**

Strategic governing and regulatory partnerships have therefore emerged both as between public and private entities, as well as between levels of government. These partnerships have developed from functional necessity, efficiency, and effectiveness. They have also developed to fill capacity gaps or vacuums. What has resulted is something of a potpourri approach to governance, where *ad hoc* partnerships have been formed to perform functions that centralised, formal, public institutions seemed unable to address either effectively or adequately on their own. This has created a mixed public/private governing environment that can make it difficult to pinpoint the locus of authority, responsibility, and decision-making. Responsibility can be exclusively the province of one sector or it can be shared. This will further vary from issue to issue in each state. The number of governance elements active today can be destabilising because of the potential for disconnects among them particularly as we move from activities within states to cross-border activities.

Ensuring that these elements remain appropriately synchronised to support international law's role as part of good global governance, is the challenge posed by the practical accommodations made to meet international law's contemporary needs for implementation, dispute settlement, revision, monitoring, etc. Taken individually, each of the developments listed above could be seen as a positive development. It is the cumulative effect of these practical accommodations that may be responsible for a sense of system-wide stress and dysfunction causing some to wonder if we are heading into a 'world of disorder'<sup>13</sup> or some kind of systemic breakdown. What adds to the complexity of understanding governance today is that those playing important governance roles are no longer exclusively from the public sector, but may also be from the private sector. Those playing important global governance roles are no longer exclusively functioning on the international or national levels, but also on the sub-national or local level. David Held has well captured the normative and political challenge we face today:

[W]e live with a challenging paradox – that governance is becoming increasingly a multilevel, intricately institutionalized and spatially dispersed activity, while representation, loyalty and identity remain stubbornly rooted in traditional ethnic, regional and national communities.<sup>14</sup>

<sup>13</sup>See ASIL 2005 Annual Meeting Theme Statement 'New world order or world in disorder? Testing the limits of international law' available at [www.asil.org](http://www.asil.org).

<sup>14</sup>Held 'From executive to cosmopolitan multilateralism' in Held and Koenig-Archibugi (eds) *Taming globalisation: Frontiers of governance* (2003) 166.

This is a key area where I think international law has an important role to play to ensure a stable world order and global governance – that is, ensuring that the elements now active in global governance are properly recognised as to their authority, scope of responsibility, and relationship to a broader governing framework. As Robert Keohane observed:

Since there is no global government, global governance involves strategic interactions among entities that are not arranged in formal hierarchies. Since there is no global constitution, the entities that wield power and make rules are often not authorized to do so by general agreement.<sup>15</sup>

Understanding this phenomenon and providing an operating framework are tasks suited to international lawyers, but accomplishing this may require a fundamentally changed view of world order. States may remain major actors, but their capacities are supplemented by a pool of strategic partnerships at the international, national, and sub-national levels. The following table developed by Robert Keohane and Joseph Nye identifies key elements and actors now active as part of global governance.<sup>16</sup>

	Private	Governmental	Third Sector
Supranational	TNCs	IGOs	NGOs
National	Firms	Central	Nonprofits
Subnational	Local	Local	Local

Such a multilevel system could work, but only if it has adequate capacity to govern effectively, if all elements at all levels can cooperate, and perhaps most importantly, if the function and purpose of these elements are widely recognised and understood.<sup>17</sup> This is also where the role of states and governments has changed from being one of problem solving to becoming one of interdependence management.<sup>18</sup> If the proper conceptual adjustments can be made, international law could serve a facilitating role in moving the international system towards a juridical order with a common respect for law by providing all these elements with common purpose and direction to enhance coordination and to contribute to a generally stable governing environment.

<sup>15</sup>Keohane 'Global governance and democratic accountability' in Held and Koenig-Archibugi (eds) n 14 above at 131-2.

<sup>16</sup>Keohane and Nye n 7 above at 13.

<sup>17</sup>The institutional innovations undertaken by the European Union are an important example of a multilayered system of governance, but may be too specific to the historic experience and financial resources of Europe to be readily duplicated more generally. Nevertheless, EU institution-building clearly has much to teach us in this area.

<sup>18</sup>Kennedy, Messner and Nuscheler (eds) *Global trends and global governance* (2002) 59.

As we begin to conceive and to operationalise a new globalised governing environment, it may be important and useful to understand that governance is neither a static nor a finite phenomenon. And, the state – the principal governing unit within the international system – is itself changing. Saskia Sassen notes that:

... critical components of authority deployed in the making of the territorial state are shifting toward becoming strong capabilities for detaching that authority from its exclusive territory and into multiple bordering states.<sup>19</sup>

It may also be useful to recall that the capabilities of the future are generated by the capabilities and capacity of present experiences and institutions – including the state.

### **Globalisation and the transnational political and legal space**

But what is it about today's global world that distinguishes it from what has come before and what implications, if any, does this have for international law's capacity to govern? After all, we know that global forces have existed throughout history, and that international law today bears only a pale resemblance to its forebears of centuries past.

Forces of nature such as the ending of the Ice Ages, have had profound effects on habitat and migration patterns for plant life, wildlife, and humans for millennia. The transmission of disease is also not a new phenomenon with smallpox introduced by European explorers nearly eradicating the native populations in the New World in the fifteenth and sixteenth centuries. And, forces of globalisation historically have been two way exchanges with the Old World benefiting from New World crops, such as the potato and corn. Similarly, the flow of ideas and culture is not new as one observes from the spread of Buddhism throughout Asia, and the influence of such fashions as the classic white and blue Ming porcelain on European pottery patterns. Yet, we discern a difference.

Robert Keohane and Joseph Nye explain that the difference is in its 'thickness'. They describe an example of 'thin globalization' as the trading route between Europe and Asia we have come to know as the Silk Road:

... the route was plied by a small group of hardy traders, and the goods that were traded back and forth had a direct impact primarily on a small (and relatively elite) stratum of consumers along the road.<sup>20</sup>

By contrast,

'thick' relations of globalization involve many relationships that are intensive

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<sup>19</sup>Sassen *Territory, authority, rights: From medieval to global assemblages* (2006) 419.

<sup>20</sup>Keohane and Nye n 7 above at 7.

as well as extensive: long-distance flows that are large and continuous, affecting the lives of many people.<sup>21</sup>

David Held and others distinguish the current wave of globalisation from earlier waves of global forces in its 'sheer magnitude, complexity, and speed'.<sup>22</sup> In terms of thickness, this means 'that different relationships of interdependence intersect more deeply at more different points'.<sup>23</sup> This not only greatly complicates governance, it also creates conditions where '... small events in one place can have catalytic effects, so that their consequences later and elsewhere are vast'.<sup>24</sup>

Although these conditions create opportunities for innovation, they exist only for short periods of time. Vacuums will be filled faster and faster and by whatever entity (public or private) can do so first. This is a particular challenge for formal governing institutions and mechanisms that may not be the most flexible or the quickest to react. This is where non-governmental organisations (NGOs) have had a particular role to play as gap-fillers pending more deliberate and formal adjustment in regulatory regimes or governance mechanisms by recognised public authorities.<sup>25</sup> It is also where the capacity to regulate or to deliver goods and services, has become an issue as increasing numbers of people are affected by an increasing number of cross-border or transnational issues. Governments also now find themselves in competition with private services. Postal services may be an example of this where private courier services are increasingly in direct competition with national postal services. Such competition has raised public expectations with regard to quality of service, and this affects both the public and private sectors.<sup>26</sup>

Responding to this fundamental change, former UN Secretary-General Kofi Annan recognised the adjustment that would be required for such inter-governmental organisations as the United Nations. (In fact, he might have included the state system in general in his assessment of the need to develop strategic partnerships for global governance.) He wrote:

We must also adapt international institutions, through which states govern together, to the realities of the new era. We must form coalitions for change, often with partners well beyond the precincts of officialdom.<sup>27</sup>

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<sup>21</sup>*Ibid.*

<sup>22</sup>*Id* at 11.

<sup>23</sup>*Ibid.*

<sup>24</sup>*Ibid.*

<sup>25</sup>See Ku and Diehl 'Filling in the gaps: Extrasystemic mechanisms for addressing imbalances between the international legal operating system and the normative system' (2006) 12 *Global Governance* 161-83.

<sup>26</sup>See, eg, Kamarck 'Globalization and public administration reform' in Nye and Donahue (eds) n 7 above at 229-52.

<sup>27</sup>Annan 'We the Peoples': *The role of the United Nations in the 21<sup>st</sup> century* (2000) 7.



The need for such strategic partnerships was neither a rhetorical device nor a conceptual abstraction, but a need that arose from recognising the capacity required to govern effectively in a global environment – a capacity that would be quickly exhausted if it were to rely solely on traditional interstate relations and resources. Capacity concerns include those related to implementing the norms generated by a more active network of transnational relations.

This increased activity was encouraged in part by the rise in the number of non-governmental organisations (NGOs) and their increased political sophistication and capacity – backed by private financial resources.<sup>28</sup> Examples of this can be seen in the MacArthur Foundation's support for the International Criminal Court and the International Commission on Intervention and State Sovereignty that produced the report on a Responsibility to Protect.<sup>29</sup> The UN's programme of world conferences provided the opportunities for NGOs to gain political experience working in the international arena.

Over time, these NGO forums have come to generate as much interest as the world conferences themselves and all the more so when widely recognised celebrities became associated with particular issues. NGO forums serving as political training grounds and public focal points, is not an exclusively UN phenomenon. One of the most historically significant experiences came out of the follow-up conferences organised as part of the ongoing Conference on Security and Cooperation in Europe (CSCE) that took place following the conclusion of the Helsinki Accords in 1975. The 'human dimension' that was developed through these regular follow up conferences by CSCE members not only deepened general awareness of the human rights implications of various government actions, but also provided important opportunities for activists associated with such groups as Solidarity, Helsinki Watch, and Charter 77, to gain legitimacy, to network, and to hone their political skills.<sup>30</sup> As the Cold War came to an end in 1989, the strength and sophistication of these groups seemed to have caught government officials by surprise. Perhaps even more surprisingly, the government of the then Soviet Union chose not to suppress these expressions of 'people power' as it had done in 1956 when it put down the uprising in Hungary.

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<sup>28</sup>See generally Clark 'The sovereign limits of global civil society: A comparison of NGO participation in UN world conferences on the environment, human rights, and women' (1998) 51 *World Politics* 1 and 20.

<sup>29</sup>*The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* (December 2001) available at <http://www.iciss.ca>.

<sup>30</sup>See Buergenthal *CSCE human dimension: The birth of a system* (Collected Courses of the Academy of European Law 1992).

### Non-governmental actors as strategic partners<sup>31</sup>

The opportunity for NGOs to play a more direct role in norm creation and standard setting in the globalised environment stems in part from the kinds of issues that are now on the international agenda. A rich literature that also draws on work in social networks has developed to capture the experiences of NGOs. An early example of such a strategic partnership can be seen in the tripartite structure of the International Labour Organization where employers, governments, and workers are given equal voice in the making and implementation of international labour agreements. (Despite this set up that presumably would take into account all necessary views in order to put into place labour standards, the ratification rate of ILO conventions is low.)

The technical character of contemporary issues now facing policy-makers continues to make them, as they have been for decades, receptive to expert information.

New technology and the increasingly complex and technical nature of issues of global concern not only increase decision makers' uncertainty about their policy environment but also contribute to the diffusion of power, information, and values among states, thereby creating a hospitable environment for epistemic communities.<sup>32</sup>

Thus, NGOs now see their roles enhanced as technology permits a new range of communications, information-gathering, and networking opportunities that can bypass state authorities.

Structurally, international law remains constrained by a preoccupation with designated formal actors within territorial states that conduct activities across borders and may not yet take into the account the 'disaggregated state'. Anne-Marie Slaughter describes this as: '... the rising need for and capacity of different domestic government institutions to engage in activities beyond their borders, often with their foreign counterparts'.<sup>33</sup> As any observer of politics will note, each of these cross-border activities creates opportunities for lobbying and involvement by new actors if they have the resources to do so.

What NGOs have been able to provide that governments have not, is a useful link between the sub-national or the local communities to national and international institutions and communities. By providing such a link, NGOs supplement the human and financial resources of governments and intergovernmental organisations. At the same time, it may still be difficult to imagine a generalised-

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<sup>31</sup>A substantial portion of this section was taken from Gamble and Ku 'International law – New actors and new technologies: Center stage for NGOs?' (2000) 31 *Law and Policy in International Business* 6237-40.

<sup>32</sup>Adler and Haas 'Conclusion: Epistemic communities, world order, and the creation of a reflective research program' (1992) 46 *International Organization* 367 and 387.

<sup>33</sup>Slaughter *A new world order* (2004) 12.

across-the-board role in norm creation for NGOs. Nevertheless, we can see that opportunities for NGO involvement and expertise will increase as international law-making becomes a more framework-oriented and iterative process, rather than a series of specific and static norms.

NGOs have been extending their activities from issue identification and definition to the monitoring of state and IGO compliance with and implementation of international legal obligations. One of the most dramatic shifts in NGO direction has been in the humanitarian area where

[t]hrough the human rights discourse, humanitarian action has become transformed from relying on empathy with suffering victims and providing emergency aid to mobilizing misanthropy and legitimizing the politics of international condemnation, sanctions, and bombings.<sup>34</sup>

Traditionally, NGOs have helped to mould treaty language, although usually working through national delegations. Increasingly, they are acting in their own right on behalf of their particular view or cause. As treaties become more organic, entities constantly changing and meeting new contingencies rather than static statements of norms, NGOs have a wider range of opportunities to influence norm development. One prominent example of this can be found in the more than 50-year history of the International Whaling Commission.<sup>35</sup>

Other examples where we have seen active NGO involvement in norm creation or standard setting are:

- Development and adoption of the Framework Convention on Tobacco Control where two NGO alliances comprising more than 200 NGOs in ninety-one countries together with seventy-five transnational NGOs in fifty countries, joined forces to create a Framework Convention Alliance to bring the Convention into being in 2003.<sup>36</sup>
- 1997 Ottawa Landmines Convention that led to the awarding of the Nobel Peace Prize to Jody Williams, founder of the International Campaign to Ban Landmines, and mobilised more than 200 NGOs to lobby the US government alone.<sup>37</sup>
- In the preparation and final drafting of the Rome Statute of the International Criminal Court, where the two-year run-up to the intergovernmental

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<sup>34</sup>Chandler 'The road to military humanitarianism: How the human rights NGOs shaped a new humanitarian agenda' (2001) 23 *Human Rights Quarterly* 700.

<sup>35</sup>See Peterson 'Whalers, cetologists, environmentalists, and the international management of whaling' (1992) 46 *International Organization* 147 ff.

<sup>36</sup>See Crow 'Smokescreens and state responsibility: Using human rights strategies to promote global tobacco control' (2004) 29/Winter *The Yale Journal of International Law* 209-50.

<sup>37</sup>See Price 'Reversing the gun sights: Transnational civil society targets land mines (1998) 52 *International Organizations* 613 ff and Wurst 'Closing in on a landmine ban: The Ottawa Process and US interests' (1997) June/July *Arms Control Today* 14 ff.

conference gave NGOs the opportunity to organise and to build relationships with UN secretariat staff and other key players in the drafting of the Statute.<sup>38</sup>

### **National and sub-national units and institutions as strategic partners**

Strategic partnerships can also occur in a variety of forms at the implementation level. One group of partnerships involves units of government that have traditionally had less prominent roles in cross-border or transnational activity, but are nevertheless still within the public sector. Two examples of this kind of partnership are:

- Anne-Marie Slaughter's concept of transgovernmental networks or governance, and
- Harold Koh's notion of importing the international into the domestic legal system through a transnational legal process.

Governance through transgovernmental networks, functions by adopting 'rules concerning issues that each nation already regulates within its borders; crime, securities fraud, pollution, tax evasion,' are examples of issues. The incentive for national regulators to use these transgovernmental rules is the transnational nature of many of the issues they now address. Working transnationally offers regulators the benefits of coordinating actions with other countries.<sup>39</sup> The advantage for states is the flexibility and decentralisation that this approach provides. The shortcoming is in any formal accountability or oversight of such actions until or unless a conflict occurs.

For international law, this approach means a 'nationalization of international law'. In this concept,

[r]egulatory agreements between states are pledges of good faith, that are self-enforcing, in the sense that each nation will be better able to enforce its national law by implementing the agreement if other nations do likewise. Laws are binding or coercive only at the national level. Uniformity of result and diversity of means go hand in hand, and the makers and enforcers of rules are national leaders who are accountable to the people.<sup>40</sup>

This is clearly a piece of the contemporary governance picture, although its operation and implications for a common respect for the law may still be developing.

Transnational legal process and legal internalisation is another form of nationalising international law and is closely associated with Harold Koh who describes a threefold process: interaction, interpretation, and internalisation.<sup>41</sup>

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<sup>38</sup>Benedetti and Washburn 'Drafting the International Criminal Court Treaty: Two years to Rome and an afterword on the Rome Diplomatic Conference' (1999) 3 *Global Governance* 1-37.

<sup>39</sup>Slaughter 'The real new world order' (1997) 76/Sept/Oct *Foreign Affairs* 191-2.

<sup>40</sup>*Id* at 192.

<sup>41</sup>Koh 'Why do nations obey international law?' (1997) 106/June *The Yale Law Journal* 2649.

Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three... Judicial internalization can occur when domestic litigation provokes judicial incorporation of human rights norms either implicitly, by construing existing statutes consistently with international human rights norms, or explicitly, through what I have elsewhere called 'transnational public law litigation'. Legislative internationalization occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric.<sup>42</sup>

### **Business as strategic partner**

Another group of partnerships involve public and private entities working together, or where private entities perform public functions. This last scenario is most likely to occur if the private group can ensure compliance with the standard because it represents all major actors, or because it developed the most feasible approach to a problem. Examples of this are the work of the International Organisation for Standardisation that has given us such widely recognised items as the size and thickness of credit cards, and the electronic ring tones of telephone digits. Other perhaps less widely recognised, but still important practices that have standard-setting implications, are the Uniform Customs and Practices for Documentary Credits used by commercial banks in issuing letters of credit, and the International Union of Credit and Investment Insurers that adopted standards that have subsequently become international agreements. In the case of the Uniform Customs Practices, these have gained recognition as a standard because of the reliance placed on them by United States' courts in resolving letter of credit disputes.

The experience of developing and implementing corporate social responsibility, provides interesting insight into the effectiveness of informal governing mechanisms. Recognising the power of large multinational corporations and their influence on the well-being particularly of less developed countries, the United Nations attempted to formulate a code of conduct for transnational corporations to cover a range of issues including labour, consumers, the environment, corruption, and restrictive business practices.<sup>43</sup> The code was never formally adopted due to deep divisions between the developing and developed world. The UN then moved to a less confrontational approach through the Global Compact that 'encourages companies to support and adopt a series of principles related to social responsibility' and to seek partners to join in this effort. To date, 2 900 businesses from 100 countries are listed.<sup>44</sup> Although the Global Compact has had some modest success in getting corporations to look at issues related to their social

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<sup>42</sup>*Id* at 2657.

<sup>43</sup>See UN Economic and Social Council Resolution 1908 (1974).

<sup>44</sup>See UN Global Compact at <http://www.unglobalcompact.org>.

responsibility, they have also been strongly resistant to turning any of these practices into legal norms, preferring to subject themselves to moral persuasion.<sup>45</sup>

Nevertheless, there seems a growing disquiet with exclusive reliance on such informal practices. See, for example, the following observation by the Geneva-based International Council on Human Rights Policy that:

The relevance of international law and enforcement is beginning to be treated seriously. Indeed, there is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory and incoherent efforts.<sup>46</sup>

NGOs also continue to rely on national laws because of the stronger enforcement mechanisms available to them at that level.<sup>47</sup> NGO efforts to develop the international legal responsibility and liability of multinational corporations, have explored using the international human rights system to do so. Isabella Bunn explains that:

Corporate responsibility: ...this quest for greater legal accountability of corporations may be understood as part of the international community's commitment to the international rule of law. The law, of course, is not without its limits; but it is one means of advancing the realization of international justice. Many NGOs would argue that global companies, as powerful economic, social, and political actors, must increasingly be brought within the law's domain.<sup>48</sup>

### **Conclusion: Strengthening international law's capacity to govern and imagining a multilayered system of governance**

Thanks to a very rich period of norm creation and institution building in the last half of the twentieth century, we have identified an increased number of potential elements for a system of global governance in the private sector – both business and public interest as well as in levels of the public sector to include local government. We have whole new areas of law that have emerged from this new transnational political space: international criminal law, environmental law, trade law, and human rights law. If the transnational political space is the horizontal axis of a matrix, then we can imagine a vertical axis that captures the processes and units of governance where we will certainly still see public institutions and states. But the state no longer functions alone and no longer functions as a single unit. This has enabled and created much of the normative growth we have seen.

The persistent presence of the traditional units of government as part of any governance picture is worth noting. This suggests the ongoing need for structure

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<sup>45</sup>See Bunn 'Global advocacy for corporate accountability: Transatlantic perspectives from the NGO community' (2003-4) 19 *American University International Law Review* 1283.

<sup>46</sup>As quoted in Bunn n 45 above at 1291.

<sup>47</sup>*Id* at 1293-4.

<sup>48</sup>*Id* at 1265.

even in a disaggregated and non-hierarchical world. For example, whether national laws are seen as the best way to regulate corporate governance, or whether strengthening national laws with regard to tobacco control is the most important way of making the Framework Convention on Tobacco Control a reality, international law seems to have discovered national governments anew as an important strategic partner. The Cities for Climate Protection programme<sup>49</sup> provides an example of how a multilayered governance system can work wherein it is simultaneously global and local, state and non-state, and is becoming an effective part of global environmental governance.

The development of a governance perspective involves recognizing the roles of supranational and subnational state and nonstate actors, and the complex interactions between them, in the process of governing. Such an approach is particularly relevant in the context of global environmental issues, where modes of governing are multiple and include processes and institutions that transverse scales as well as networks of actors that cannot be easily characterised by the state/nonstate dichotomy.<sup>50</sup>

In a similar vein, Anne-Marie Slaughter and William Burke-White see new governance opportunities for transnational governmental networks to enhance the capacity of states to function effectively both within and outside its borders.

The international legal system could harness the power of transgovernmental networks much more effectively than it does currently. For example, international law could more explicitly recognize the role of such networks and the soft regulations they often produce. Hard legal instruments could mandate or facilitate the creation of transnational networks in a range of areas of critical state weakness such as justice and human rights. Where the weakness of a particular government in a functional area poses a threat to international order, the UN Security Council could require state participation in such a network. Government networks offer an important tool to improve state capacity. Actors within the international legal system would be well served to partner with such networks and more directly integrate them into larger international legal frameworks.<sup>51</sup>

What both of these views touch on are the possible pathways by which governing authorities that are traditionally grounded in the international or in the national can reposition themselves to create the greatest capacity for the particular activity in question. The stronger the pieces, or the more effectively issues are regulated, the stronger the norm will be, or the more effective the regulation will be. And the stronger the individual norms and the regulatory

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<sup>49</sup>See Betsill and Bulkeley 'Cities and the multilevel governance of global climate change' (2006) 12 *Global Governance* for a description of this 'transnational network of municipal governments seeking to mitigate the threat of global climate change'.

<sup>50</sup>*Id* at 144.

<sup>51</sup>Slaughter and Burke-White 'The future of international law is domestic (or, The European way of law)' (2006) 47 *Harvard International Law Journal* 337.

environment, the stronger a general governing system should be. The ability to capture and to recognise these complex interactions and *ad hoc* accommodations is the place that international law finds itself today.

One useful starting point in identifying these pathways may be that of authoritative decision-making<sup>52</sup> where actions of individual governing units build on each other in order to address the need both for governance and change. I am also mindful of Martti Koskienniemi's skepticism about what he calls efforts to 'deformalize' law.<sup>53</sup> Koskienniemi notes that '[i]f law is only about what works, and pays no attention to the objectives for which it is used, then it will become only a smokescreen for effective power'.<sup>54</sup> He argues powerfully for maintaining the integrity of law so that what is 'valid' law is known and not clouded by political purpose or other desires that may be valuable, but are not law.<sup>55</sup> This is an important reminder and is what distinguishes law from governance. At the same time, valid law is a crucial part of effective governance.

A multilayered system of governance does not have to be a return to some form of early Westphalianism where multiple units compete without regard to the general order. It is rather recognition of a complex governing system where elements of global governance act in less formal and less hierarchical ways in order to increase the flexibility and speed with which they can address new developments. It is an opportunity to understand how international law manages and directs this complex system of governance. What then are the possible pathways through which actors – public or private, national or local – become part of a multilayered system of global governance? This paper has focused largely on practical accommodations, that is, does the arrangement work to achieve the desired results? How these accommodations can become part of a more durable governance system is the question we now face? What are the authoritative pathways by which accommodations can become generalised and regularised?

The human rights system seems one that is increasingly being relied upon to provide a recognised normative and institutional framework for global governance. See, for example, how this might work in the case of the Framework Convention on Tobacco Control:

The increased use of international human rights institutions to address tobacco-related human rights violations can be expected to highlight the role of the tobacco industry in derailing effective tobacco control initiatives by national governments. By codifying minimum requirements for global tobacco control, the FCTC, together with

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<sup>52</sup>Higgins *Problems and process of international law* (1994) at 2-12.

<sup>53</sup>Koskienniemi *The gentle civilizer of nations: The rise and fall of international law 1870-1960* (2001) 479.

<sup>54</sup>*Id* at 486.

<sup>55</sup>*Id* at 495.



the jurisprudence of international human rights institutions, will provide a common frame of reference for states. These standards should inspire more comprehensive national tobacco control legislation and more vigorous enforcement efforts by national courts. Conversely, proactive efforts by national courts to expand the scope of domestic human rights norms to encompass tobacco control guarantees may raise the profile of tobacco-related human rights violations at the international level.<sup>56</sup>

Or, in the case of intellectual property, where the European Convention on Human Rights has been used to restrain the rights of copyright holders.

These decisions rely on human rights law to overcome the 'malfunctions' of the intellectual property system, using them as a 'corrective when [intellectual property] rights are used excessively and contrary to their functions'.<sup>57</sup>

The rights of copyright or trademark holders have also relied on the protection of the European Convention on Human Rights and its system of review as seen in the *Anheuser-Busch, Inc v Portugal* case where the European Court of Human Rights concluded in 2005 that 'registered trademarks are protected by the property rights clause of the European Convention's first Protocol'.<sup>58</sup>

So, what would a multilayered system look like? It could be guided by some broad principles seeking to establish a juridical order with a common respect for law. Such principles might include:

- 1 A commitment to a law-based, but not necessarily institutionalised international system that is sufficiently robust to address the myriad challenges and issues that now face states, and that is effective in addressing a state's interests and responsibilities. This would include some means of juridical or third-party assessment in case of a dispute or ambiguity.
- 2 A commitment to creating the conditions that will compel states to close the economic, political, and social gaps that presently exist within societies and throughout the world. A law-based system cannot work unless the law and rules appear to provide all with equal opportunity and the means to pursue interests within the system.
- 3 A commitment to effective management of transnational problems through strategic public and private partnerships. An important part of effective management would be transparency in the decision-making process, and accountability to a broadly recognisable and accepted authority – public or private.
- 4 A commitment to 'consultation and active assistance' in the place of 'unilateral action and noninterference'.<sup>59</sup>
- 5 A commitment to broad participation by all who are affected by an issue.

<sup>56</sup>Crow 'Smokescreens and state responsibility: Using human rights strategies to promote global tobacco control' (2004) 29 *Yale Journal of International Law* 250.

<sup>57</sup>Geiger in Helfer 'Toward a human rights framework for intellectual property' (2007) 40 *UN Davis Law Review* 1017.

<sup>58</sup>Geiger n 57 above at 1016.

<sup>59</sup>Slaughter *A new world order* (2004) at 30.

This multilayered system is already in operation, but the special challenge for international lawyers is to reach beyond existing institution-centered and state-centered operating assumptions and concepts to encompass the wider variety of processes and agents that now exist to give life and meaning to international legal obligations. It is an opportunity to add to and to modify the existing formal structure of international law by recognising the realities of a disaggregated state, a non-hierarchical system of governance, and a transnational political space that includes complex interactions with private and sub-national units of government. Taking advantage of the opportunity will strengthen and enable international law to play a central role in contemporary global governance.